

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

United States Court of Appeals
For the Second Circuit

Docket Number:

77-1330

United States of America,

v.

Alfred Lewis, Defendant-appellant

PETITION FOR REHEARING OF
APPEAL

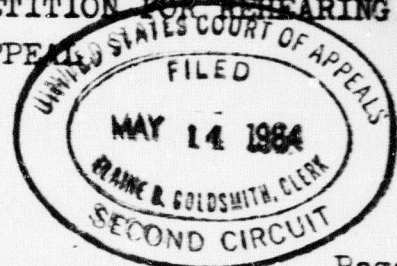


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PRELIMINARY STATEMENT

1. Jurisdiction of court to consider this application

This is an application for rehearing pursuant to the decision of this Court of Appeals in the case of Braniff Airways Inc. v. Curtiss Wright Corp., 424 F. 2d 427, 429 stating that this Court has the power to consider a petition filed after rehearing has been denied and to modify an erroneous decision on appeal.

2. Appeal background and mention of relevant question presented thereon

This case involved an in forma pauperis appeal---pro se by the layman appellant pursuant to an order of this Court dated September 30, 1977, Kaufman, J.---upon the original record and a typewritten original with three copies of the appellant's brief pursuant to Rules 24(c) and 31(b), Federal Rules of Appellate Procedure, and local rule 30(2) from a judgment of conviction for bank robbery (18 USC 2113, subds. [a] and [d]) rendered in the United States District Court, Southern District of New York on May 18, 1977, Metzner, J., after a jury trial. On February 17, 1978 this Court affirmed the judgment of conviction without opinion. A motion for rehearing was denied April 13, 1978. Raised inter alia on the appeal was the contention that the defendant's warrantless seizure by police, which caused the production of evidence which led to his conviction, violated the Fourth Amendment.

STATEMENT OF ISSUE'S MERIT OF RECONSIDERATION

Defendant-appellant's conviction was obtained by use of evidence secured pursuant to an unconstitutional arrest whose legality was affirmed by the trial court's use on the suppression hearing of an improper legal standard which unconstitutionally took into account

factors developed for the first time at the suppression hearing which were not known by or imputed to the arresting officer at the time of the seizure. Terry v. Ohio, 392 U.S. 1, 20-22. This issue of the use by the suppression-hearing court of the unconstitutional standard in determining the legality of defendant's seizure was not included in the appellant's brief due to defendant-appellant's unawareness at that time of the legal significance of the hearing court's recorded comments in making its determination as evidence that it did not apply the constitutional standard in disposing of the motion to suppress. Rehearing should be granted in the interest of justice. See Braniff Airways Inc. v. Curtiss Wright Corp., ante; United States v. Certain Land, 420 F. 2d 371 (2 Cir., 1969); National Comics v. Fawcett Publications, 198 F. 2d 927 (2 Cir., 1952).

STATEMENT OF FACTS

The undisputed facts of the defendant's arrest are as follows:

The defendant was seized in Manhattan, New York City, by the New York City police around 10:00 a.m. January 27, 1977 on 85th Street and Amsterdam Avenue (HA, pp. 11, 14-17)* at a police roadblock set up to stop the taxicab in which he was riding as a passenger. This roadblock was established at the instance of New York City plainclothes police officer Walter Cowles because another taxicab had stopped alongside of Cowles' unmarked police car near 73rd Street and the passenger therein, whom Cowles had never seen before, told him that the passenger in the taxicab up ahead that he the informant had been following, meaning the cab in which the defendant was riding, was carrying a gun and had just struck his car (meaning with another automobile in an accident that had

* HA refers to the minutes of that part of the suppression hearing that took place on April 4, 1977 pursuant to a defense motion to suppress on grounds of unconstitutional arrest the evidence growing out of that arrest. All pages of these minutes referred to are included herein at pages 9 to 24. HB will refer to the minutes of that part of the suppression hearing that took place on April 14, 1977. All pages of these minutes referred to are included herein at pages 25 to 37.

previously occurred [the informant, Reinaldo Carnival HB, 3] (HA, Cowles, 9-14, 24).^{*} At the said roadblock Officer Cowles, with gun drawn, approached the cab in which the defendant was a passenger and ordered the defendant first not to move or he would be shot, then to remove his hand from his coat pocket or be shot, then to emerge from the cab with his hands up and to place his hands against the cab, and the defendant complied with all of the foregoing orders without incident (HA, Cowles, 13-15). There was never any indication prior to the defendant's seizure, either given to the officer by the tipster Carnival or observed by the officer, that defendant was trying to escape pursuit or had known that he was being pursued or followed (HA, 24-25).

After the defendant's removal from the taxicab Officer Cowles asked him if he had a gun, and the defendant indicated yes with a nod of his head (HA, Cowles, 16), whereupon Cowles reached into the defendant's pocket, removed a "loaded" and "cocked" Colt 45 automatic, and thereafter the defendant was taken to the 20th Precinct police station where he was charged with unlawful possession of a gun (HA, Cowles, 16, 17, 18). Officer Cowles did not remember if the gun's safety device was on or off at the time (HA, Cowles, 32). Following the defendant's

* Although the informant (Reinaldo Carnival) testified at the suppression hearing that the driver of the car that struck his car did not stop but continued on after the accident and that the defendant subsequently threatened him by putting his hand inside his coat and telling him to leave the area, the tipster never saw a gun (HB, 6) and never told Officer Cowles (1) that defendant threatened him, and (2) that the driver of the car that struck his vehicle continued on without stopping after the accident, or (3) any other facts from which Officer Cowles could infer that the alleged gun was unlicensed or on which could be based a founded suspicion that the alleged gun was unlicensed or even a firearm of the type prohibited by law without a license.

arrest a suitcase was removed from the rear seat of the cab in which the defendant was riding by another police officer who was present, who took it directly to the stationhouse, opened it and found it to contain paper bags containing money that Cowles later found out was from a bank holdup in another precinct (HA, Cowles, 16-17, 18-19). Upon the pretrial suppression hearing the government did not contend by any evidence that there was any connection between the bank robbery for which the defendant was subsequently convicted and the seizure for investigation and/or arrest of the defendant.

Prior to the determination at the suppression hearing defendant's counsel contended that the above facts regarding the initial seizure--- the defendant being ordered out of the cab at gunpoint following a road-blocade stop, the complete deprivation of his freedom of movement--- indicated that an actual arrest of the defendant and not an investigatory stop had taken place (HB, 31-32).

In denying the motion to suppress the Court (HB, 33-34) prefaced its decision with an articulation of the things on which it obviously relied in making its determination. It relied on the testimony of the tipster Reinaldo Carnival (HB, 3) that the car that struck his car did not stop following the accident. It also relied on Carnival's testimony (HB, 5,7) that defendant had threatened him by putting his hand inside his (the defendant's) coat and telling him to leave if he didn't want to get killed, but that he, Carnival, instead continued to follow the defendant who eventually entered a taxicab (HB, 8); that he, Carnival, entered another cab and continued to follow the defendant (HB, 9) and that he, Carnival, ultimately encountered a car he recognized as an unmarked police car and told the occupants through the open window to "follow the cab because there is a guy over there with a gun" whereupon

the police car started following the cab in which the defendant was riding (HB, 9,10,23). None of the above information, outside of the tip which consisted of the simple statement that "The man in the cab he has been following has a gun, he had just hit my car" (HA, Cowles, 11-12) was given to the arresting officer Cowles by the informant along with the tip or known by the arresting officer at the moment of the seizure for investigation or the arrest.*

The trial court denied the motion to suppress without rendering a written opinion containing its findings of fact and conclusions of law, and did not indicate in any other fashion whether its determination was based on a finding that the initial seizure of the defendant was an arrest based on probable cause or an investigatory stop supported by reasonable suspicion with the arrest taking place after the discovery of the gun.

The defendant maintained his innocence of the bank robbery upon the trial of the case, testifying in his defense that the money seized upon his arrest was given to him by another party that same day as gambling proceeds for delivery to another location.

ARGUMENT AND AUTHORITIES

The constitutional standard for Fourth Amendment determinations in cases of seizure for investigation based on reasonable suspicion and warrantless arrests based on probable cause is the personal knowledge

* It should be remembered here that the tip consisted merely of the information that the defendant had a gun and had just been involved in an automobile accident, not that he fled from the scene of an auto accident.

or information of the facts on which the arrest or investigatory seizure is based possessed by the arresting officer at the moment of the seizure. Carroll v. United States, 267 U.S. 132, 162; Brinegar v. United States, 338 U.S. 160, 175-176; Terry v. Ohio, 392 U.S. 1, 20-22; Adams v. Williams, 407 U.S. 143, 145-146; United States v. Brignoni-Ponce, 422 U.S. 873, 884. The articulated basis of the trial court's determination of the legality of defendant's seizure emphasized first-time-at-the-suppression-hearing statements given in the testimony of the informant in the case that were never told to or known by the arresting officer at the time of the defendant's seizure for investigation and/or arrest. Again, an officer's defective assessment of probable cause at the time of the arrest cannot be saved by additional facts developed at the suppression hearing, Whiteley v. Warden, 401 U.S. 560, 565, 566, with the same being true of the reasonable suspicion required for a temporary seizure for investigation. Terry v. Ohio, 392 U.S., at 20-22; Adams v. Williams, 407 U.S., at 145-146.

When there is indication that the court has used an unconstitutional standard in its determination, a new hearing is required to be held in which the proper constitutional standard is employed. Townsend v. Sain, 372 U.S. 293, 314-315; Rogers v. Richmond, 365 U.S. 534, 545-546.

If the suppression-hearing court had used the proper standard in its determination of the motion to suppress, the evidence resulting from the arrest would have to have been suppressed. For it is contrary to the Supreme Court decision in Adams v. Williams (407 U.S., at 148-149, ~~149~~) and contrary to New York State authority then in effect *

* State law determines the power of state officers to make arrests for state offenses. Miller v. United States, 357 U.S. 301, 305; United States v. Mejias, C.A.2, 1977, 552 F. 2d 435, 444.

(People v. Green, 35 N.Y. 2d 193, 196; People v. DeBour and La Fave,
40 N.Y. 2d 210, 224; New York Crim.Pr.Law §140.90)

that a tip of gun possession alone, without regard to any indication of illegal possession, is enough to warrant a forcible investigatory stop or a subsequent arrest after confirmation of such possession, still without regard to any indication of lack of legal authorization to have same. For the defendant might have been in the military service of the State or United States, in some law enforcement branch of the State or United States, or employed fulfilling defense contracts with the government of the United States or an agency thereof, or he might have been otherwise duly licensed to carry a gun. Section 265.20 of the New York Penal Law excepts all of the above from the laws prohibiting possession of guns. Additionally, the defendant might have been a hunter or trap shooter, or his gun might have been a completely legal air rifle or air pistol or a toy gun as the tipster never specified the kind of gun the man who was just involved in the auto accident with him had.

In any event the law holds that the facts here---the roadblock stop of the taxicab, the ordering of the defendant around at gunpoint and with threats to shoot him if he disobeyed any order, the complete deprivation of defendant's freedom of movement---constituted an arrest under the law (Sibron v. New York, 392 U.S. 40, 67; United States v. Ceballos, 654 F. 2d 177 [2 Cir. 1981]) requiring the informant's tip to have met the two-pronged test of Aguilar v. Texas, 378 U.S. 108, and Spinelli v. United, 393 U.S. 410, necessitating (1) arresting officer Cowles to have had prior knowledge of the tipster's reliability.

and (2) the tip to have contained a statement of the underlying circumstances from which the informant Carnival concluded that the defendant had an illegal firearm. The facts have demonstrated that the two-pronged test was not met in the present case. Additionally, even if the initial stop was a legitimate investigatory seizure--- which it arguably was not as already demonstrated---with the arrest following the discovery of the gun in the possession of the defendant, that arrest was unconstitutional for failure of the arresting officer after discovering the gun and prior to the arrest to inquire whether the defendant had any legal authorization for possessing the gun absent the officer having at that time personal knowledge or information that would indicate illegal possession. Cf. Adams v. Williams, 407 U.S., at 148-149.

CONCLUSION

In view of the clear proof of use by the suppression-hearing court of the unconstitutional standard, the case should be remanded for a determination of the Fourth Amendment question under proper constitutional standards. Townsend v. Sain, 372 U.S., at 314-315; Rogers v. Richmond, 365 U.S., at 545-546.

Respectfully submitted

Alfred Lewis
Defendant-Appellant
May 11, 1984

RELEVANT PAGES OF THE TRANSCRIPT OF THAT PART
OF THE SUPPRESSION HEARING THAT TOOK PLACE ON
APRIL 4, 1977

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Cowles-direct

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MR. JOY: I think that is correct, but I don't think we will know any of that, your Honor, unless your Honor does connect it here.

THE COURT: I think that will come up on the trial.

I will take the suppression hearing on what I gather to be the probable cause of the arrest.

MR. KINGHAM: Yes.

Your Honor, the government calls Officer Walter Cowles.

W A L T E R C O W L E S, called as a witness on behalf of the government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR.KINGHAM:

Q Mr. Cowles, are you a police officer in the New York City Police Department?

A Yes, I am.

Q And how long have you been a police officer?

A 16 years.

Q To what precinct are you presently assigned?

A 20th Precinct.

Q And were you assigned to the 20th Precinct on January 27th of this year, 1977?

1 gthr

Cowles-direct

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2 A Yes, I was.

3 Q The 20th Precinct is in Manhattan on the upper
4 west side, is that correct?

5 A Correct.

6 Q Were you on duty, Officer Cowles, at about
7 10 o'clock on the morning of the 27th of January?

8 A Yes, I was.

9 Q And where were you physically located?

10 A On Amsterdam Avenue between 72nd and 73rd
11 Streets, east side of the street, and --

12 Q Were you in a car or were you on foot?

13 A I was in a car.

14 Q And were you in uniform or in plainclothes?

15 A Plainclothes.

16 Q What was the nature of the duties you were
17 performing at that time and place?

18 A I work with the -- assigned to the 20th Pre-
19 cinct working with the Manhattan Bowery Project.

20 Q What is the Manhattan Bowery Project?

21 A The Manhattan Bowery Project is to remove
22 dereliction, people with problems of drinking, and get them
23 to hospitals.

24 Q And were you with anyone in your police car
25 at the time?

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Cowles-direct

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A Yes, I was. I work with a civilian.

A What is his name?

A Mr. Hollinger Wickens.

Q And is Mr. Wickens part of the Manhattan Bowery Project as well?

A Yes, he is.

Q And he works for them, is that correct?

A Correct.

Q Did there come a time, Officer Cowles, when you had a conversation with a man in a taxicab on Amsterdam Avenue on that morning?

A Yes, there did.

Q Would you tell Judge Metzner what happened?

A Around 10 o'clock on January 27th, while I was on patrol in the 20th Precinct, a yellow taxi pulled alongside of our car, our unmarked car.

The passenger in the back seat rolled down his window. At this time I rolled down mine. And he leaned out and he said, "Are you a police officer?"

I stated I was.

He said, "Well, the cab we have been following right in front of me has a man in the rear seat with a gun."

I said, "Wait a minute. Repeat yourself

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Cowles-direct

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again."

The man in the back seated repeated himself.
He said, "The man in the cab he has been following has
a gun, he had just hit my car."

Q Did you see the cab to which the man was
referring?

A Yes, I did.

Q And where was it?

A In front of the cab that the defendant told
me he was following.

Q It was in front of the cab --

A The complainant's report was about three-car
lengths in front of where we were sitting.

Q Were there any cars between the complainant's
car or his taxicab and the taxicab to which he was refer-
ring?

A No.

Q Did you have a clear view of that taxicab?

A Yes, I did,

Q Did you later learn that the man you spoke
with was a man named Rinaldo Carnaval?

A Yes.

Q After you had this conversation with Mr.
Carnaval, what did you do?

1 gtbr

Cowles-direct

13

2 A I took up the pursuit after this yellow
3 taxi, which was heading north, started to head north on
4 Amsterdam Avenue.

5 It previously was stopped for a traffic light

6 Q At what street was that?

7 A 73rd.

8 Q And then everyone started to move, is that
9 correct?

10 A Correct.

11 Q How long did you follow this taxicab?

12 A Approximately, I'd say around 14 blocks,
13 up to 85th Street.

14 Q During the trip from 73rd Street or 72nd
15 Street to 85th Street, did you speak on your radio at
16 all?

17 A Yes, I did.

18 Q What did you do during your pursuit?

19 A In the pursuit of the taxi, I alerted our
20 headquarters downtown that RMP 24, an unmarked car from
21 the 20th Precinct, was heading north on Amsterdam Avenue
22 after a yellow taxi with a passenger in the rear seat
23 presumably armed with a gun.

24 Our central headquarters then had all units
25 stay off the air in the 20th Precinct and asked for

1 qtbr

Cowles-direct

14

2 assistance, that other units responded to my assistance,
3 which other units did.

4 Q Did they respond in the area of 85th Street
5 and Amsterdam Avenue?

6 A They did.

7 Q What happened there?

8 A While I was riding north on Amsterdam Avenue
9 I was giving out my location and my -- the plate number
10 of the taxi, and when I hit around 84-85 Street, in the
11 middle of the block, I'd say closer to 85th Street,
12 the taxi that I was pursuing stopped, had stopped in
13 traffic, because of a police blockade which was set up.

14 Q Was that at 85th Street and Amsterdam
15 Avenue?

16 A Yes, it was.

17 Q What did you do at that point?

18 A At that point, when the taxi that I was follow-
19 ing, chasing stopped, I was able to stop my car and I got
20 out and I approached this taxi from the rear.

21 Q What did you do?

22 A As I approached the taxi, I had my gun
23 drawn. I pulled open the rear door of the taxi with the
24 defendant in the rear seat, identified myself, told him
25 not to move, that I would shoot.

2 Q You say you identified yourself. What did
3 you say?

4 A I said, "Please don't move or I'll shoot."

5 Q What did the man in the rear of the taxi do?

6 A The man in the taxi was just sitting there.
7 He had one hand in his right raincoat pocket, his other hand
8 was on his leg outside the pocket.

9 I repeated myself again to remove his hand
10 from his coat pocket.

11 I should say I stated to him to remove his
12 hand from his pocket.

13 He hesitated.

14 I said, "Take it out right now or I'll shoot
15 you."

16 The man then slowly took his hand from the
17 raincoat pocket.

18 Q Was there anything in his hand when he took
19 it out?

20 A No, there wasn't.

21 Q Then what happened?

22 A I asked the man to step out of the taxi, which
23 he did. I told him to keep his hands up.

24 I told him once he got outside, I asked him
25 to place them on top of the cab, which he also did.

1 qtbr

Cowles-direct

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2 While doing this, I asked if he had a gun. -

3 He shook his head in a yes motion.

4 Q Did he say anything verbally?

5 A No, he didn't.

6 Q What did you do?

7 A I then reached into his right-hand raincoat
8 pocket and removed a .45 Colt automatic.

9 Q Was that .45 Colt automatic loaded?

10 A Yes, it was.

11 Q Was there a round in the chamber?

12 A Yes, it was.

13 Q Was it cocked?

14 A Yes, it was.

15 Q After that, did you search any further after
16 finding the pistol in the pocket?

17 A I patted him down outside.

18 Other officers came to my aid, and one officer
19 observed a suitcase in the taxi which he removed.

20 Q Did you see the suitcase in the taxicab?

21 A Not at that time, no.

22 Q At what point was the first time that you
23 saw the suitcase?

24 A When the officer was pulling it out.

25 Q Was this from the back or the front seat of

1 gtbr

Cowles-direct

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2 the taxi?

3 A The back seat.

4 Q Let me ask you this, Officer Cowles.

5 Do you see the man in court whom you arrested
6 at that time?

7 A Yes, I do.

8 Q Would you point him out, please?

9 A He is sitting over here with the dark coat
10 on with glasses (indicating).

11 MR.KINGHAM: Indicating the defendant, your
12 Honor.

13 THE COURT: Is the identification conceded,
14 Mr. Joy?

15 MR. JOY: Yes, your Honor.

16 Q Did you subsequently learn that the man you
17 pointed to is Alfred Lewis?

18 A Yes.

19 Q After that, was Mr. Lewis then taken to the
20 20th Precinct?

21 A Yes, he was.

22 Q Was the gun taken to the precinct?

23 A Yes, it was.

24 Q Who took the gun?

25 A I did.

1 gtbr

Cowles-direct

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2 Q Was the suitcase taken to the precinct?

3 A Yes, it was.

4 Q Who took that?

5 A Officer Ramsey of the 20th Precinct.

6 Q When you got to the precinct, was Mr. Lewis
7 booked?

8 A Yes, he was.

9 Q On what kind of a charge?

10 A Possession of a gun.

11 Q Prior to the time you got to the precinct,
12 did you see or notice what was in the suitcase?

13 A No, I didn't.

14 Q Was the suitcase opened at the station house?

15 A Yes, it was.

16 Q And what did you see inside the suitcase?

17 A Two brown shopping bags containing money
18 which I found later on was from a bank holdup in the
19 19th Princinct.

20 Q Was that money counted at the precinct later?

21 A Yes, it was.

22 Q About how much money was there?

23 A Approximately \$60,142.

24 Q Officer Cowles, when a person is arrested
25 by you, is it standard procedure for you to examine and

1 gtbr

2 inventory any property that is either found in his person-
3 or in his vicinity when he is arrested?

4 A Yes, sir.

5 MR. JOY: Can we have just what he did and
6 not what the standard practice was.

7 THE COURT: True.

8 MR. KINGHAM: Your Honor, the standard
9 practice is relevant.

10 THE COURT: Ask him what he did.

11 MR. KINGHAM: I asked him what he did.

12 THE COURT: Continue with what he did.

13 MR. KINGHAM: We have gone as far as we can
14 with what he did, but I think standard practice is rele-
15 vant as to inventory.

16 THE COURT: Ask him if he did.

17 Q Did you make an inventory of the property
18 that was taken?

19 A Yes.

20 Q Is that the standard procedure and your
21 standard procedure in the Police Department?

22 A Yes.

23 Q Was the suitcase among the property that was
24 inventoried?

25 A Yes, it was.

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Cowles-cross

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2 A Correct, correct.

3 Q And do you know where Mr. Carnaval -- withdrawn

4 At some point you caught up to the cab at 85th
5 and Amsterdam, is that right?

6 A Correct.

7 Q Where was Mr. Carnaval during that time,
8 if you know?

9 A I couldn't be sure. He would be in the same
10 area I was. He seemed to be side by side or close by.

11 Q Did he follow you?

12 A Yes, he did.

13 Q Now, when you -- withdrawn.

14 You had never seen Mr. Carnaval before, is that
15 right?

16 A Never.

17 Q Now, there came a time-- withdrawn.

18 Now, the cab you were following, did that
19 continue just going straight up Amsterdam Avenue?

20 A It was weaving a little bit in and out,
21 I guess; not much.

22 Q I mean, it didn't turn off?

23 A No.

24 Q It continued straight?

25 A It went straight.

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Cowles-cross

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Q Do you have a siren or anything in your car?

A Yes, I do.

Q Did you use that?

A No, I didn't.

Q Did you make any handwritten notes of this
incident?

A Handwritten notes?

Q Yes, in your memo book or anything of that
sort?

A I did.

Q Pardon?

A I did.

Q Do you have that with you?

A Yes, I do.

Q May I see it, please?

A Yes (handing).

(Pause.)

Q Could you show me which entry relates to
this incident?

MR. KINGHAM: Your Honor, could we have the
page or pages marked perhaps and substitute copies for the
record?

THE COURT: Let him first find the page. He
hasn't identified that yet.

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Cowles-cross

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A I think so. U.S. currency.

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Q Change?

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A Change, his own personal property, yes.

5

Q Wallet, keys, that kind of thing?

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A Keys, yes. A key, I believe.

7

Q You testified as to the state of load of

8

the gun.

9

Was the safety on or off?

10

A I don't remember.

11

Q Did you take a holster from the defendant?

12

A No, I didn't.

13

Q Were you present when someone else did?

14

A Yes.

15

Q When was that?

16

A Inside the station house, I believe.

17

Q And where was the holster?

18

A It was on a belt on his hip.

19

Q Now, you are sure you took the gun from the

20

raincoat pocket?

21

A Yes.

22

Q You are sure it wasn't in the holster at that

23

time?

24

A Yes.

25

Q Now, while you were following the cab, how

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Walter Cowles	9	21	33	

EXHIBIT INDEX

<u>Defendant</u>	<u>Identification</u>	<u>In Evidence</u>
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I (We) hereby certify that the foregoing
 is a true and accurate transcript to the best
 of my (our) skill and ability from my (our)
 stenographic notes of this proceeding.

[Signature]
 Official Court Reporter
 U. S. District Court

RELEVANT PAGES OF THE TRANSCRIPT OF THAT PART
OF THE SUPPRESSION HEARING THAT TOOK PLACE ON
APRIL 14, 1977

1 THE COURT: Where was this?

2 THE WITNESS: 59th Street and Fifth Avenue.

3 THE COURT: 59th Street?

4 THE WITNESS: Yes, and Fifth Avenue.

5 Q Did that car hit yours?

6 A Yes, this car hit me on the left front fender
7 and he didn't stop. I got out of my car and I look what
8 happened and somebody behind me had this car plate's num-
9 ber and he showed me the paper and he said I got the number.

10 Q That was the license plate number he was refer-
11 ring to?

12 A Yes. I didn't see. He just showed me from his
13 car a piece of paper, you know.

14 So then I went back to my car and so this guy
15 who showed me the piece of paper went in front of me and
16 I was following him.

17 Q Did he tell you to follow him?

18 A No, he did this with the hand from inside his
19 car.

20 THE COURT: This is the man who gave you the
21 license number of the car that hit you?

22 THE WITNESS: He didn't give it to me. He just
23 showed me the paper. He was in his car. He was behind me.
24 When I got out of my car to see what happened he showed me
25

1 jqjb

Carnival - direct

5

2 the paper, the insurance paper or something. So I came
3 close to the car and he didn't say anything. So I was
4 waiting for him to say something. He got out of his car
5 and he walked all the way around to the other side, the
6 sidewalk door and he got a suitcase, a blue suitcase in
7 the back seat. Then he closed the door and he start walk-
8 ing fast, 59th Street going west.

9 So then I came to the sidewalk close to him and
10 I said, "Hey, fellow, what happened to my car," and he
11 didn't say anything. He was walking fast. I came again
12 and with the hand inside his coat he say, "Get out of here --
13 if you don't want to get killed, get out of here, boy, if
14 you don't want to get killed."

15 I stopped, you know, and I was thinking what to
16 do, what best to do. I was looking for a police officer
17 and I couldn't see anyone around. I said the best thing
18 to do is follow him. I was following him and he went --

19 Q Before you go on, could you describe what the
20 man that you had this short meeting with looked like at
21 that time?

22 A Okay. On this time?

23 THE COURT: When you saw him you walked along-
24 side of him, didn't you?

25 THE WITNESS: Yes.

1 jgjb

Carnival - direct

6

2 THE COURT: What did he look like? Describe
3 him.

4 THE WITNESS: He had a mustache and a black
5 leather hat and a black coat, a jacket -- not a jacket,
6 a coat, I think three-quarter, black.

7 THE COURT: A black leather three-quarter coat?

8 THE WITNESS: Yes.

9 THE COURT: Yes?

10 THE WITNESS: And that's all. I really don't
11 remember anything else, and the suitcase in his hand.

12 Q Did you see a gun at that point?

13 A Not at all.

14 Q And then what happened next?

15 A Then I still follow him and he went down to 60th
16 Street and Broadway, right where Columbus Circle is, the
17 Gulf & Western Building.

18 Q How many blocks was that from where you were
19 parked, do you know?

20 A Two blocks.

21 Q What happened there?

22 A In 60th Street and Broadway, he got into a cab
23 and so I came close to the cab driver and I say, don't
24 take this guy anywhere because he is a burglar.

25 Q He has what?

1 jqqb

Carnival - direct

8

2 So he left the cab with this stick and he went
3 after this guy with the stick. So I was behind the cab
4 because I was afraid if something happened, you know.

5 I could see many people around stopping and
6 looking what happened and when this cab driver came with
7 the stick, so he didn't get too close and he came back,
8 you know. He came back from this guy because I couldn't
9 see him moving, I couldn't see very well because I was
10 behind the cab in the street.

11 So then the cab driver, he came back to the
12 cab and so this guy disappeared. I didn't see him any
13 more but I knew he went to 61st Street. We was in 60th,
14 on 60th Street -- close to 61st. I walked to 61st Street
15 and I was looking around behind the trucks and the cars
16 parked over there to see if I could see this guy and then
17 I was on the right side on 61st and then I walked to the
18 left side and I saw him get into another cab, a checker
19 cab, a big one.

20 Q A checker cab?

21 A Yes, a checker. So he got into this cab and
22 then I saw this other cabbie, the guy who was with me
23 before, he was going up to 61st to Central Park South, you
24 know, he came into the same street and he was looking
25 around and trying to see this guy.

1
2 So then I came to the cab driver again and I
3 say, "I saw this fellow -- I saw this guy get into the
4 other cab and he say which one and I say the one over there
5 in the front and so he went alone to follow the cab and I
6 said wait for me," I shout.

7 So then he stopped and he came back and I got
8 into the cab so we both was following him. I think he had
9 a CB radio or something in the cab or he was talking with
10 his dispatcher or something, I don't know.

11 Q Did there come a time when you came across a
12 policeman in an unmarked car?

13 A This was in Amsterdam Avenue and 72nd Street.

14 Q And what took place there?

15 A This guy inside this cab, we was following him
16 on Central Park West going uptown. So on 72nd Street, and
17 at that point I am not sure if it's 72nd Street, you know,
18 but I think it's 72nd Street, they make a left turn going
19 west. So we did the left turn and was following the cab.

20 On Amsterdam Avenue there was a traffic light
21 so we were stopped in the traffic light and then on
22 Amsterdam Avenue they make the right turn and we did the
23 right turn, too. So we were stopped in the traffic light
24 again and I couldn't see any police car around. And I saw
25 this black car, Plymouth with civilian --

1
2 THE COURT: What?

3 THE WITNESS: The black Plymouth car, civilian
4 cabs, because I drive all around in the city and I see many
5 cars like this, black Plymouth cars and most of the times
6 they are police officers.

7 So I told the cab driver, I said I think they
8 are police officers and so we were stopped in the traffic
9 light anyway. I opened my window and I say -- at the same
10 time they was looking for me, who the car was too, and I
11 said follow this cab because of a guy over there with a gun.

12 So they opened the whole window and they said
13 again and I said follow the cab because there is a guy over
14 there with a gun. So then we both was following this cab
15 and -- but the police car was a little bit far. So then
16 they got close and with my finger I point with the car and
17 on 86th Street the light got red again. We were a little
18 bit far from this cab. We didn't want to get too close.

19 When I saw many police cars around everywhere
20 and this car, this black car came, an officer, he got out
21 of the car and he went close to the cab with the gun in
22 his hand and he put it in the window, in his window, and
23 he opened the door and he told guy to go out. I was afraid
24 before this happened when everybody -- when this detective
25 was walking to this cab I was afraid this guy to get out

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A Yes. His dispatcher or the police.

Q He was talking to somebody on the radio?

A Yes, I don't know.

Q Then you got to 72nd Street and Amsterdam Avenue?

A Correct.

Q And you turned right on Amsterdam Avenue from 72nd Street, is that right?

A That's right.

Q And the cab that you were following was right in front of you, is that correct?

A That's correct.

Q At the point you saw the unmarked police car, I believe you testified, that you recognized it because you drive around the city all during the day, is that right?

A Yes.

Q You are a messenger for the Archer Messenger Service?

A That's right.

Q In the course of your duties, do you use your own car to drive around the city?

A Yes, my own car.

Q The car that was hit?

1
2 A Yes, and I could see the other car with --
3 giving a message or something by radio, you know.

4 MR. JOY: I have no further questions.

5 THE COURT: You may step down.

(Witness excused.)

THE COURT: Any other witness?

8 MR. JOY: No, your Honor.

9 There may be one more, your Honor, wait one
10 second.

11 No further witnesses, your Honor.

12 MR. KINGHAM: Nothing further from the government,
13 your Honor.

14 THE COURT: What's the basis for your position,
15 Mr. Joy?

16 MR. JOY: Your Honor, I submit that the hearing
17 on the motion to suppress has demonstrated the following:
18 that a policeman who was at 72nd Street saw a man riding
19 in a cab whom he had never seen before and who said the man
20 in the cab, he has a gun. Based on that and that alone,
21 the police officer followed the cab and arrested the defen-
22 dant at 85th Street by approaching the cab with guns drawn,
23 with a gun drawn, and ordering him out of the cab, asking
24 him or rather reaching into his pocket and withdrawing a
25 gun.

He was arrested solely for alleged possession of a gun. There was no indication that there was a bank robbery afoot. As far as the officer knew, he was simply a man riding in a cab. There was no effort made by the officers to check at the scene whether they had in fact apprehended the right man who an unknown informant had advised them was the person he thought had a gun. The person who made that statement has testified on the stand today that he never saw a gun.

There was no questioning of the defendant as to his identification. It wasn't a so-called terry stop. Even though there was plenty of opportunity to do that it was not in a high crime area and, of course, carrying a gun is not a crime. It's carrying a gun if you don't have a license.

So that I submit that this is not the kind of case that was before the Supreme Court in Adams versus Williams where the informer or the person who gave the police officer in that case information as to the fact that a person had a gun was known to the officer and his reliability therefore had been tested in the past. This is just somebody that this officer saw in a cab. I think this is not the kind of situation that is mentioned in the government's memorandum of law.

1 jqjb
2 THE COURT: What do you do when a citizen
3 experiences what the witness testified he experienced?
4 Looking for a cop to arrest a man who is, by the menacing
5 movement of his arm, saying get away or I will kill you,
6 follows that man, is the policeman supposed to say let the
7 fellow go away while I check what you are telling me. You
8 wouldn't catch any criminal in New York.

9 MR. JOY: I am not suggesting that. What I sug-
10 gest is that before a citizen is arrested, taken out of a
11 taxi cab and searched that there ought to be some inquiry
12 as to whether this in fact is the person that the informer
13 said.

14 THE COURT: He is not an informer, he is a
15 citizen.

16 MR. JOY: He is a citizen who has given informa-
17 tion.

18 THE COURT: He is not an informer. He is a per-
19 son who is a little upset that his car was hit and the
20 fellow who hit him is running away and when he catches up
21 to him the fellow says get away or I will kill you and
22 instead of getting away he follows that man. I wish more
23 people would do that in this town, and he goes to the
24 policeman when he finds one, and he says, we are following
25 that cab and he continues to follow. He doesn't disappear.

He goes right up to the point of arrest.

MR. JOY: There was no description given by the citizen who says to the officer --

THE COURT: He didn't have time. You are going to stop and get out of the car and talk to the policeman while a light changes and the other cab gets away?

MR. JOY: It certainly would have been possible to have halted Mr. Lewis, taken the couple of minutes to summon --

THE COURT: Not when a charge of a gun is involved. You call for help first before you stop.

MR. JOY: If that is so, then a policeman can search anybody on the street. All he needs is a citizen to say I think that fellow has a gun.

THE COURT: And the person who makes the charge continues the chase with you.

MR. JOY: It's described as a chase but there is no indication except that he was following a cab. He could have had the wrong cab, the wrong person.

THE COURT: Motion denied.

MR. JOY: Exception, your Honor.

THE COURT: All right. Be here at 10:00 Monday morning.

MR. KINGHAM: Thank you, your Honor.

MR. JOY: I would like to renew the application I made earlier for a transcript of the motion to suppress. The witnesses who testified at this motion to suppress will probably be testifying at the trial and to permit cross examination, adequate cross examination, it's going to be necessary for me to have the minutes of the hearing.

THE COURT: All right. Submit the order and I will sign it.

I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of the proceeding.

Joseph Quinones

Official Court Reporter
U. S. District Court

Docket No
77-1330
U.S.A v Alfred Lewis

Alfred Lewis
#349-83-26001
Manhattan House of Detention
125 White Street
New York, N.Y. 10013

United States Court of Appeals
Second Circuit
Clerk's Office
U.S. Court House - Foley Square
New York, N.Y. 10007

May 9, 1984

Sir:

Enclosed, with proof of service, are four copies of an eight-page motion for rehearing of the above entitled forma pauperis appeal disposed of in 1978 without opinion.

This motion is not untimely. Braniff Airways Inc. v. Curtiss Wright Corp, 424 F. 2d 427 (2 Cir., 1970); United States v. Certain Land, 420 F. 2d 371 (2 Cir., 1969).

Very truly yours
Alfred Lewis

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1330

United States of America,

v.

PROOF OF SERVICE

Certification

Alfred Lewis, Defendant-appellant

This is to certify that a copy of the accompanying petition for rehearing was today served upon the respondent herein by mailing same to him by First Class Mail addressed as follows:

United States Attorney
Southern District of New York
One St. Andrews Plaza
New York, N.Y. 10007

Under penalty of perjury defendant-appellant swears the foregoing statements to be true.

Alfred Lewis

Defendant-appellant

Alfred Lewis
#349-83-26001-~~8-E~~, 9-L
Manhattan House of Detention
125 White Street
New York, N.Y. 10013

May 11, 1984

Sworn to before me this day
of 1984

Notary Public

RECEIVED

984 MAY 14 AM 11: 47

COURT OF APPEALS
SECOND CIRCUIT